

of high-speed Internet access, digital video, and other advanced services to more consumers, sooner, and at increased levels of efficiency.” They state that such deployment will serve the public interest by offering consumers new or expanded service offerings, as well as stimulating competition and innovation for new advanced services and features.”

176. Applicants contend that these benefits will be achieved through an enhanced ability to finance capital expenditures as well as through efficiencies and synergies that can be realized only by merger.” With respect to increased financial resources, Applicants state that Comcast has a proven ability to manage an accelerated upgrade plan while maintaining its operating margins.” They also note that Comcast currently is generating high “free cash flow” from its operations, providing a significant non-debt source of funding for capital expenditures.<sup>518</sup> Applicants further state that Comcast possesses a balance sheet significantly stronger than that of AT&T. Comcast’s ratio of debt to operating cash flow was less than 4 to 1 in 2001, while AT&T’s debt-to-operating cash flow ratio was more than 8 to 1.<sup>519</sup> Applicants estimate that the combined company will have a first year combined debt-to-operating cash flow ratio of less than 5 to 1.<sup>520</sup>

177. Applicants also assert that the proposed transaction will produce certain efficiencies. These include operating efficiencies generated by eliminating duplicate costs and improving the operations of AT&T’s cable systems. Based on past experience, Applicants claim that management could raise the price-to-cost margins on the AT&T systems to be comparable to the average for the Comcast systems.” Applicants also claim that the proposed transaction would enable more efficient use of infrastructure as well as more efficient provisioning, repair, and maintenance.<sup>522</sup> In addition, Applicants state that the proposed transaction will enable the merged entity to obtain volume discounts in the purchase of Internet backbone services used to transport Internet traffic, and to consolidate call centers and other centralized functions of these operations.<sup>523</sup> Overall, Applicants estimate that increased operating efficiencies would generate an additional \$200 to \$300 million per year in earnings before interest, taxes, depreciation, and amortization (“EBITDA”) after three years.<sup>524</sup> Applicants also expect the merged entity to achieve lower prices on capital items of approximately \$200 to \$300 million per

<sup>514</sup> *Id.* at 29-30. Some commenters agree that the merger will accelerate deployment of facilities-based high-speed Internet access service, digital video, and other advanced services. See generally PFF Comments; CapNet Comments. The Applicants also state that the merged firm will have a strong incentive to pass cost savings and other efficiencies through to consumers in the form of reduced cable prices. Applicants’ Reply, Shelanski Decl. at ¶¶40-45.

<sup>515</sup> Application at 28-29.

<sup>516</sup> *Id.* at 47; Applicants’ Reply at 19-20.

<sup>517</sup> More than 95% of Comcast’s customers are served by systems with a capacity of at least 550 MHz, and over 80% are served by systems with a capacity of 750 MHz or greater. Because of these upgrades, Comcast’s high-speed Internet access service is available to the vast majority of the homes passed by its systems. Application at 30.

<sup>518</sup> *Id.* at 31.

<sup>519</sup> *Id.*

<sup>520</sup> *Id.*

<sup>521</sup> Application. Pick Decl. at ¶ 26. Comcast’s operating margin in year 2001 was more than 40%, in contrast to AT&T’s margin of approximately 25%. *Id.*

<sup>522</sup> Application at 33.

<sup>523</sup> *Id.* at 33-34.

<sup>524</sup> Application at 33 n.50. Pick Decl. at ¶¶ 25-28.

year.<sup>525</sup>

178. Applicants also state that the merger would allow for programming cost savings resulting from volume economies in purchasing. With respect to most programming, Applicants assert that the merged entity would obtain the best rate currently received by either AT&T or Comcast.<sup>526</sup> Applicants anticipate that as programming contracts expire, the merged entity may be able to further reduce programming costs, because a higher volume discount would apply to the combined AT&T Comcast subscriber base.” In addition, they claim that the merged entity’s larger subscriber base may provide leverage to resist “supra-competitive” rate increases by video programming suppliers.<sup>528</sup> The Applicants estimate that the merger would reduce programming expense by \$250 to \$450 million per year.”

179. In total, Applicants estimate that within five years, the merger will result in synergies and efficiencies worth approximately \$1.25 to \$1.95 billion per year in increased EBITDA.<sup>530</sup> Applicants assert that some of these savings can be used to upgrade AT&T cable systems that have not yet been upgraded.” According to Applicants, AT&T has experienced deployment delays due to rising capital costs and significant budget constraints related to a heavy debt load. As a result, Applicants argue that substantial additional investment is needed to complete upgrades to AT&T’s systems and to deploy new services to consumers.

180. Applicants also anticipate that the merger will provide national scale that will allow the merged firm to more efficiently defray the research, development, and testing costs associated with the rollout of new services and features.<sup>532</sup> Such economies are particularly critical, they say, to deployment of ITV, voice-enhanced data, home networking and security, and other new untested broadband services.” They note that the merged firm will create a larger player whose commitment to such services is more likely to drive needed investment and research by equipment manufacturers, software developers, and others that are critical to the successful development and deployment of such services.<sup>534</sup> In addition, Applicants assert that the combined company will benefit from each company’s complementary expertise gained from offering certain services or conducting trials of new services. As examples, Applicants cite AT&T’s greater expertise in the provision of electronic commerce service, Comcast’s valuable experience in customer care through its QVC operations, and Comcast’s trials of a new cable-based home security service.”

181. Many commenters opposing or seeking conditions on the proposed transaction concede that it may produce broadband service deployment benefits, but argue that the potential harms to competition in the provision of new broadband services, or to competition in the market for the purchase

<sup>525</sup> Application at 32-33, Pick Decl. at ¶¶ 22-24.

<sup>526</sup> Application at 32 n.51; Pick Decl. at ¶¶ 18-21

<sup>527</sup> *Id.*

<sup>528</sup> *Id.*

<sup>529</sup> Application at 32 n.51

<sup>530</sup> *Id.* at 31.

<sup>531</sup> *Id.* at 30.

<sup>532</sup> *Id.* at 33.

<sup>533</sup> *Id.*

<sup>534</sup> *Id.*

<sup>535</sup> *Id.* at 34-35.

of video programming, outweigh those benefits.” CFA contends that the broadband deployment benefits described by Applicants can be achieved absent the merger, noting that several small cable operators already have successfully completed upgrades.<sup>537</sup> In its comments, CWA asserts that the financial structure of the transaction raises questions about the merged entity’s ability to deliver on promises to speed deployment of new broadband services.<sup>538</sup> CWA also notes that analysts downgraded AT&T’s debt rating when the merger was announced, demonstrating that the merged AT&T Comcast will not have increased access to capital, but higher capital costs.<sup>539</sup> After submitting its comments, CWA issued a statement in support of the proposed transaction.”

182. *Discussion.* Based on our review of the record, we find that the proposed transaction is likely to result in synergies and efficiencies resulting in significant cost savings. The Applicants have submitted evidence to support their claim, and the comments do not seriously contest this point. The more difficult question before us is whether these synergies and efficiencies are likely to translate into accelerated deployment of broadband services and other new services to consumers. Market conditions and consumer demand are likely to have a significant influence on rate of deployment of these nascent and still-evolving services. As CFA indicates, moreover, broadband deployment is occurring on an industry-wide basis.<sup>541</sup> These factors add to the difficulty of determining whether the proposed transaction will further accelerate that trend. Nevertheless, after examining the record, we conclude that the proposed transaction is likely to have a positive impact on deployment of broadband services.

183. We agree with Applicants that the merged entity is likely to accelerate the deployment of broadband services in AT&T service areas. Although most cable providers are deploying broadband, AT&T has experienced particular difficulty in meeting its deployment plans even though it has “expended significant resources to upgrade” its cable network.<sup>542</sup> Despite the economies that AT&T could have achieved as the nation’s largest MSO, as of December 31, 2001, AT&T had upgraded only 59% of its cable plant to 750 MHz capability.<sup>543</sup> In contrast, Comcast, AOL Time Warner, Cablevision, Cox, Charter, and Insight have upgraded at least 70% and as much as 94% of their cable plants to 750 MHz.<sup>544</sup> As the Applicants admit, moreover, Comcast has been able to upgrade its plant more quickly than AT&T while maintaining operating margins and a debt-to-cash flow ratio that is superior to AT&T’s.<sup>545</sup> Thus, Comcast appears to have a greater “ability to manage an accelerated program for upgrading its plant while maintaining its operating margins.”<sup>546</sup> We believe that applying this expertise to the AT&T cable systems

<sup>536</sup> BellSouth Comments at 10-11; CFA Comments at 20; KCN Comments at 6; Qwest Comments, Haring Decl. at 8, 19; SBC Comments at 26, Gertner Decl. at ¶ 26.

<sup>537</sup> CFA Comments at 22.

<sup>538</sup> *Id.* at 17-19

<sup>539</sup> *Id.* at 19

<sup>540</sup> On June 14, 2002, CWA announced that it supports the proposed transaction because it would expand access to high-speed Internet services, lead to the creation of quality jobs, and improve labor relations. See CWA, *CWA Backs AT&T Broadband-Comcast Merger* (press release), Jun. 13, 2002.

<sup>541</sup> CFA Comments at 22.

<sup>542</sup> See Application at 30

<sup>543</sup> *Id.* at 18.

<sup>544</sup> The approximate figures for each MSO are: Comcast (80%), AOL Time Warner (92%), Cablevision (84%), Cox (81%), Charter (70.7%), and Insight (94%). See Application at 10 for the Comcast figures; other figures are based on each company’s Form 10-K (*i.e.*, an annual report or, in the case of AOL Time Warner, a transition report) filed with the Securities and Exchange Commission.

<sup>545</sup> Application at 31; Application, Pick Decl. ¶ 26

<sup>546</sup> Application at 30-31

is likely to have a positive impact on the deployment of broadband to AT&T subscribers that currently do not have access to those services.

184. We also agree with the Applicants that the greater scale and scope of the merged entity is likely to spur new investment. The development and deployment of new technologies often entails a significant up-front, fixed investment. The merged company should have a greater ability to spread those fixed costs across a larger customer base, which should in turn foster incentives for investment by the merged entity, as well as other businesses that seek to sell equipment, technology, and services to the merged entity. Finally, to the extent Comcast and AT&T each have particular expertise in electronic commerce and customer care that they can bring to the merged entity, that also should contribute positively to consumer experience.<sup>547</sup>

185. We find nothing in the record that detracts from these positive benefits. CWA's claims concerning the merged entity's debt ratio were based on an erroneous assumption that AT&T Corp. contributed capital to AT&T Broadband. In fact, contributions from AT&T Broadband are in the form of debt that must be repaid.<sup>548</sup> Although CFA argues that larger and more regionally concentrated cable companies charge higher prices, CFA does not provide sufficient evidence to support its argument that size or clustering cause higher prices. Accordingly, on this record, we reject CFA's argument.

## B. Accelerated Deployment of Cable Telephony

186. **Background.** Applicants assert that the proposed transaction will "further accelerate the deployment of facilities-based local telephone competition, creating substantial public interest benefits."<sup>549</sup> They assert that AT&T Comcast will have a "stronger financial footing"<sup>550</sup> and within five years, it will "generate an additional \$600 to \$800 million in EBITDA annually by providing cable telephony to Comcast's former service areas."<sup>551</sup> Applicants also assert that the Comcast systems will benefit from AT&T's "technical and operational expertise in launching and providing cable telephony" and from access to AT&T's "back office systems," such as order processing, customer care, billing, and market research.<sup>552</sup>

187. Several commenters dispute Applicants' argument that the proposed transaction would promote the deployment of cable telephony.<sup>553</sup> Qwest and SBC argue that AT&T has not "delivered" on

<sup>547</sup> The Applicants state that they have complementary expertise in certain areas, which they can share to improve existing services and deploy new services. As examples, they cite AT&T's greater expertise in the provision of electronic commerce service, Comcast's valuable experience in customer care through its QVC operations, and Comcast's trials of a new cable-based home security service. Application at 34-35.

<sup>548</sup> The Applicants respond that AT&T Corp. does not contribute capital to AT&T Broadband, and that any AT&T Corp. contributions to AT&T Broadband are loans like any other debt. Applicants' Reply at 21. In response to CWA's allegations that the merged entity would be less able to secure debt, the Applicants state that AT&T Comcast recently secured \$12.8 billion in credit agreements in order to finance the merger and post-merger capital expenditures. *Id.* at 21-22.

<sup>549</sup> Application at 36.

<sup>550</sup> *Id.* at 38.

<sup>551</sup> Application. Pick Decl. ¶ 12; *see also* Application at 38.

<sup>552</sup> Application at 40-42.

<sup>553</sup> CWA Comments at 3; CFA Comments at 20-21; *see also* CFA Reply to Opposition at 18-19. In contrast, CapNet supports Applicants' arguments that the proposed transaction will promote deployment of cable telephony. CapNet Comments at 3-4.

its “promise[.]” to deploy cable telephony after it acquired the TCI and MediaOne cable systems,<sup>554</sup> and that, at current deployment rates, AT&T Comcast is unlikely to offer cable telephony to all of the homes passed by the merged entity’s cable systems for at least several years.<sup>555</sup> They also contend that the proposed transaction will reduce the incentive to deploy cable telephony because it will separate AT&T’s long distance business from its cable assets<sup>556</sup> and because Comcast historically has been skeptical about investing in cable telephony.” Qwest argues that Applicants’ statements about deployment are “conditional” on business factors and economic trends and therefore should be discounted.<sup>558</sup> SBC argues that the proposed benefit is not merger-specific because a limited joint venture would suffice to permit AT&T to “serve the customers in question.”<sup>559</sup> SBC also argues that Applicants’ assertions about planned cable telephony investment in Philadelphia and Detroit are “limited” because AT&T currently has switching infrastructure in those cities.”

188. Applicants respond that AT&T has successfully deployed cable telephony in many markets, substantially meeting the projections it submitted in connection with its acquisition of TCI.<sup>561</sup> Applicants’ assert that Comcast “has devoted significant resources to develop cable-delivered IP telephony.”<sup>562</sup> Although Comcast has “acknowledged that [it] has been slow to deploy cable telephony,” Applicants assert that the merged company will be able to “take advantage” of AT&T’s investment to provide greater telephony competition to residential consumers.<sup>563</sup> Applicants argue that the merged entity will have an economic incentive to deploy cable telephony to recover the costs of the merger aid to compere with DBS service.<sup>564</sup> Applicants also note that AT&T has “cable telephony expertise and infrastructure” and that the viability of cable telephony does not depend on AT&T’s long distance business.<sup>565</sup> Finally, Applicants assert that the claimed benefits cannot be achieved by a joint venture because of complex technical problems that would be difficult to resolve through contracts and the “rapid pace of technological evolution and convergence.”<sup>566</sup>

189. *Discussion.* Although no party disputes that accelerated deployment of cable telephony

<sup>554</sup> Qwest Comments at 21; *see also* SBC Comments at 27 n.72.

<sup>555</sup> Qwest Comments at 26

<sup>556</sup> If the proposed transaction is consummated, AT&T Comcast would hold the AT&T Broadband cable assets, while AT&T’s long distance business would remain with AT&T Corp. *See generally* AT&T Corp., *AT&T to Create Family of Four New Companies; Company to Offer to Exchange AT&T Common Stock for AT&T Wireless Stock* (press release). Oct. 25, 2000.

<sup>557</sup> Qwest Comments at 21, 23, 24-27; SBC Comments at 28

<sup>558</sup> Qwest Comments at 28.

<sup>559</sup> SBC Comments at 30

<sup>560</sup> *Id.* at 29. SBC also asserts that the Commission should prohibit AT&T Comcast, and those entities with which it has a joint marketing arrangement, from “relying] on the UNE-P in any areas where it has cable facilities.” *Id.* at 12-13. “UNE-P” refers to an “unbundled network element platform” consisting of the combination of loop, switching, and transport network elements provided by incumbent LECs to competitive LECs. *See Presubscribed Interexchange Carrier Charges*, 17 FCC Rcd 5568, 5577 ¶ 20 n.52 (2002).

<sup>561</sup> Applicants’ Reply at 9-11 & n.15

<sup>562</sup> *Id.* at 12

<sup>563</sup> *Id.* at 12-13.

<sup>564</sup> *Id.* at 14-15

<sup>565</sup> *Id.* at 16

<sup>566</sup> *Id.* at 17-20.

services is a public interest benefit?" several commenters question whether the proposed transaction would produce that benefit. In weighing the competing arguments, we recognize the inherent difficulty in making judgments about the future deployment of new technologies.<sup>568</sup> It is therefore important that we be convinced that the projected benefit is reasonably certain to be realized as we make our public interest evaluation.<sup>569</sup> Here, IP telephony, which the record indicates is the technology on which the merged entity will focus for new telephony deployments in Comcast service areas, contains too many uncertainties for us to make that determination.

190. We agree with Applicants' premise: with AT&T's cable telephony resources, the merged company is likely to be more adept at deploying cable telephony in Comcast service areas than Comcast would be if it were to develop the expertise and the back office systems by itself. Developing the expertise and systems needed to offer a commercial cable telephony service involves a significant commitment of resources.<sup>570</sup> Engineers and technicians who understand the technical steps that need to be made to offer reliable telephony services must be hired and trained. Systems must be developed to ensure proper call management and adequate quality of service, and interconnection agreements must be negotiated with incumbent LECs. New billing, marketing, and customer care systems must be developed and implemented. In addition, attention must be given to ensure compliance with federal, state, and local regulatory requirements, if any, that may apply to IP telephony. As the nation's largest cable telephony provider, AT&T has developed the expertise and the systems necessary to deploy and market cable telephony on a wide scale.<sup>571</sup> We have recognized in prior decisions that expertise and developed systems can provide certain advantages with respect to market entry,<sup>572</sup> and we see no reason on this record to conclude otherwise."

191. Here, however, the record indicates that the speed with which the merged entity will deploy cable telephony in Comcast service areas depends primarily on the successful development of commercially feasible primary-line<sup>574</sup> cable VoIP technology.<sup>575</sup> Although Comcast currently operates

<sup>567</sup> See *AT&T-MediaOne Order*, 15 FCC Rcd at 9892 ¶ 178; *AT&T-TCI Order*, 14 FCC Rcd at 32281 ¶ 147.

<sup>568</sup> See *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11365 ¶ 67 (2002).

<sup>569</sup> See *AT&T-MediaOne Order*, 15 FCC Rcd at 9883 ¶ 154; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063-64 ¶ 158; see also *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255.

<sup>570</sup> See, e.g., Richard Bilotti, Benjamin Swinburne, and Megan Lynch, *IP Telephony: Leveraging the Cable Network to Profitability in Voice*, Morgan Stanley Dean Witter, Feb. 14, 2001, at 18 ("*Profitability in Voice*").

<sup>571</sup> See Letter from David L. Lawson, Sidley, Austin, Brown & Wood, LLP, to Marlene H. Donch, Secretary, FCC (Jun. 7, 2002) at 1-2 ("AT&T June 7, 2002. Ex Pane").

<sup>572</sup> See *AT&T-MediaOne Order*, 15 FCC Rcd at 9886-89 ¶¶ 161-69; *AT&T-TCI Order*, 14 FCC Rcd at 3229-31 ¶¶ 147-48.

<sup>573</sup> We disagree with CFA that recognizing these advantages here is inconsistent with the Commission's prior decisions approving certain mergers between Regional Bell Operating Companies ("RBOCs"). See CFA Comments at 20-21. Consistent with our reasoning today, the Commission in the RBOC orders recognized that the RBOCs had expertise in providing local telephony. There, that expertise resulted in a potential *harm* because the Commission found that they helped make the merging RBOCs significant potential competitors in each other's incumbent regions. See, e.g., *SBC-Ameritech Order*, 14 FCC Rcd at 14752-53 ¶¶ 84-85; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20040-41 ¶ 107.

<sup>574</sup> As used here, the term "primary-line" refers to services that provide customers the features, functions, and service quality customarily associated with plain old telephone service ("POTS"). The term thus excludes so-called "secondary-line" services, such as those that do not guarantee the ability to make and receive calls using back-up power during a general power failure or blackout. See D.R. Evans, *Digital Telephony over Cable: The PacketCable Network 506-507* (2001) ("*Digital Telephony over Cable*").

circuit-switched cable telephony systems that it acquired in connection with certain cable system acquisitions,” it generally has chosen to await further development of VoIP technology before investing in wide scale deployment of cable telephony.” We see little evidence that the merged entity would adopt a different philosophy concerning cable telephony deployment in Comcast service areas.<sup>578</sup> According to Applicants, the merged company “intends to begin to deploy telephony service” to about one million homes in the Philadelphia and Detroit markets.<sup>579</sup> In both markets, IP technology will be deployed.<sup>580</sup>

192. Were primary-line cable VoIP a proven technology, we could be more confident that AT&T’s expertise and existing systems would spur the merged entity’s investment of cable telephony in Comcast service areas. Cable VoIP, however, is still nascent; although the concept has existed for several years, no cable operator in the United States has yet deployed the technology on a wide-scale commercial basis.<sup>581</sup> This creates a high level of uncertainty surrounding the pace of cable telephony deployment that “makes the claimed benefits speculative at best and, therefore, difficult to evaluate.”<sup>582</sup> Applicants appear to realize that the future of cable VoIP deployment remains uncertain; their deployment of cable telephony in Detroit and Philadelphia is subject to the “operational performance [and] financial performance of cable telephony service in the marketplace.”<sup>583</sup>

193. Applicants contend, nevertheless, that several technical and operational advances have occurred that eliminate technological and operational impediments to primary-line cable VoIP deployment. The “most critical” of these developments, they assert, is the development of Data Over Cable System Interface Specification 1.1 (“DOCSIS 1.1”).<sup>584</sup> Among other things, **DOCSIS 1.1** provides

(...continued from previous page)

<sup>575</sup> Cable VoIP technology refers to an IP-based system in which the telephony signal generated by the caller is converted into many “packets” of information, which are then transmitted over shared capacity through the cable network to the headend. See *Profitability in Voice* at 23. This differs from “traditional” circuit-switched telephony, in which a unique transmission path, or circuit, is dedicated to each call. *Id.* at 22.

<sup>576</sup> See Application, Pick Decl. ¶ 10.

<sup>577</sup> See *Eighth Video Competition Report*, 17 FCC Rcd at 1248 ¶ 10.

<sup>578</sup> If the proposed transaction is consummated, Comcast’s President, Brian L. Roberts, will become Chief Executive Officer and President of AT&T Comcast, and would select the other members of senior management in consultation with C. Michael Armstrong, current Chairman of the Board and Chief Executive Officer of AT&T and designated Chairman of the Board of AT&T Comcast. AT&T Comcast Corporation, Amendment No. 3 to Form S-4, Registration Statement under the Securities Act of 1933, filed with the Securities and Exchange Commission on May 14, 2002, at 1-13. Mr. Roberts cannot be removed from his position until 2010 unless 75% of the board of AT&T Comcast agrees. *Id.* at 1-33.

<sup>579</sup> Application at 38.

<sup>580</sup> In Detroit, Comcast is implementing a hybrid IP-circuit switched approach. In this approach, IP technology is used in the connection between the customer’s home and the headend, after which the signal is converted and processed through Comcast’s existing switch. See Letter from James L. Casserly, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., to Marlene H. Dorrch, Secretary, FCC (Aug. 20, 2002).

<sup>581</sup> See *Eighth Video Competition Report*, 17 FCC Rcd at 1248 ¶ 10.

<sup>582</sup> Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, 15 FCC Rcd 14032, 14132 ¶ 214 (2000); see also SBC-Ameritech Order, 14 FCC Rcd at 14843 ¶ 306.

<sup>583</sup> Applicants’ July 2, 2002 Response at 45; see also Application, Pick Decl. ¶ 8.

<sup>584</sup> Applicants’ July 2, 2002 Response at 48.

quality of service and call security specifications that are intended to make cable VoIP calls parallel the quality, reliability, and privacy of a traditional POTS call.<sup>585</sup> According to Applicants, media terminal adapters (“MTAs”)<sup>586</sup> and “carrier class” cable modem termination servers (“CMTSs”)<sup>587</sup> (i.e., CMTSs that can maintain a call even if one of its components fails) that are CableLabs Certified as DOCSIS 1.1-compliant are only recently “beginning to become available.”<sup>588</sup> Applicants further argue that cable VoIP has been delayed because “no IP phone solution has to date been fully compliant with PacketCable specifications.”<sup>589</sup> According to Applicants, now “there are a number of solutions that appear to be very close to being PacketCable compliant.”<sup>590</sup> In addition, although “the technological impediments to IP phone service have nearly been overcome,” Applicants assert that “various technical issues will arise and need to be addressed as the system is increased in scale” to serve a large number of users.<sup>591</sup> At an operational level, cable VoIP requires, according to Applicants, an automated provision process, which they assert “is only now being developed.”

194. Although we recognize that much progress has been made toward developing a commercially viable cable VoIP service, we cannot ignore the significant uncertainty that remains. Applicants admit that “various technical issues will arise” as the technology is deployed on a wide scale.<sup>592</sup> They also recognized that no VoIP phone solutions are yet PacketCable compliant<sup>593</sup> and software to manage automatic provision “is only now being developed.”<sup>594</sup> AT&T, moreover, has “no firm plans for the deployment of IP cable phone service,” even though it “has planned to use IP phone service in new deployments when the necessary equipment, systems, and processes become commercially available and economically viable.”<sup>595</sup> Given the current state of the technology and its deployment, we cannot be certain of what technical, operational, or cost issues will arise as cable VoIP advances toward full-scale commercial operation. If any of these issues causes a significant delay in commercial deployment, it would considerably attenuate any benefit that the proposed transaction could otherwise have achieved.

195. Moreover, the proposed transaction would eliminate an incentive that AT&T currently

<sup>585</sup> See *id.*; CableLabs, *CableModem FAQ*, <http://www.cablemodem.com/faq/#FAQ17> (visited Aug. 2, 2002); Rouzbeh Yassini, *DOCSIS Overview for DOCSIS Community Q3 2001*, at 12, at <http://www.cablemodem.com/downloads/010719website.ppt> (visited Aug. 2, 2002).

<sup>586</sup> An MTA enables communication between the cable modem and standard analog telephones and other customer premises equipment by converting signals from one into a form that the other can understand. See *Digital Telephony over Cable* at 16-17.

<sup>587</sup> A CMTS is located at the headend and manages the IP traffic over the cable plant. *Id.* at 17; see also *Profitability in Voice* at 13. The CMTS can manage both voice and data traffic, which can result in a significant cost savings for cable operators that provide both services. See *id.* at 16.

<sup>588</sup> Applicants’ July 2, 2002 Response at 48.

<sup>589</sup> *Id.* at 50. PacketCable is a platform designed to work “on top of” DOCSIS 1.1 to “deliver advanced real-time multimedia services [such as VoIP] over two-way cable plant.” Cable Labs, *Project Primer: PacketCable*, at 1, at <http://www.packetcable.com/downloads/PackageCable.pdf> (visited Aug. 8, 2002).

<sup>590</sup> Applicants’ July 2, 2002 Response at 50.

<sup>591</sup> *Id.*

<sup>592</sup> *Id.*

<sup>593</sup> *Id.* at 50.

<sup>594</sup> *Id.* (stating that a number of solutions are “very close to being PacketCable compliant”).

<sup>595</sup> *Id.*

<sup>596</sup> *Id.* at 42



has to deploy cable telephony: to develop an alternative telecommunications network that can compete against the incumbent LECs' network," particularly as RBOCs obtain authority under section 271 of the Communications Act to provide in-region long distance services.<sup>598</sup> Since acquiring TCI and MediaOne, AT&T has pursued a relatively aggressive cable telephony deployment strategy, electing to deploy circuit-switched technology to build market share rather than awaiting the further development of cable VoIP as many other MSOs have done.<sup>599</sup> Since AT&T Comcast will be predominantly a cable company and not a telecommunications company, it will not have the same incentive to protect its core business by deploying cable telephony.<sup>600</sup>

196. Applicants maintain that the merged entity will have several other incentives to deploy cable telephony. They contend that it will need to deploy cable telephony to recoup the cost of the proposed transaction.<sup>601</sup> We cannot agree. Accelerated deployment of cable telephony does not appear to have been a significant factor in Comcast's initial decision to seek a merger with AT&T Broadband.<sup>602</sup> Nor can we conclude that the success or failure of the proposed transaction hinges on the successful deployment of new cable telephony services. To the contrary, analyst reports indicate that the "company believes additional telephony spending is not a priority in the near-term and the company will be focused on improving the AT&T Broadband video business, as a major focus."<sup>603</sup> Applicants' own estimate of \$600-800 million in annual EBITDA from new cable telephony deployment would not be realized until five years after the merger closes,<sup>604</sup> while the transaction's other "synergies and efficiencies" would be realized immediately or generally within three years.<sup>605</sup> We therefore discount the significance of Applicants' projected revenue from new cable telephony deployment to account for the different time frames involved.

197. Applicants also claim that the merged entity has an incentive to deploy cable telephony in Comcast service areas to "continue to grow and meet investor expectations," and to compete more

<sup>597</sup> See AT&T Corp., *AT&T and TCI Complete Merger* (press release), Mar. 9, 1999 (noting that the company would "offer any-distance, wire-line communications services").

<sup>598</sup> See 41 U.S.C. § 271.

<sup>599</sup> See, e.g., Jeff Halpern *et al.*, *Circuit-Switched Cable Telephony: Why It Makes Sense for AT&T*, Bernstein Research (Apr. 6, 2001).

<sup>600</sup> See Qwest Comments at 21, 23, 26-27; SBC Comments at 28.

<sup>601</sup> Applicants' Reply at 14 (citing *AT&T-MediaOne Order*, 15 FCC Rcd at 9892 ¶ 178 and *AT&T-TCI Order*, 14 FCC Rcd at 3230-31 ¶ 148).

<sup>602</sup> Comcast acknowledges that its current plans to deploy cable telephony resulted from its discussions with AT&T in negotiating the proposed transaction. See Application at 38-39 n.69; Application, Pick Decl. ¶ 12; see also Applicants' Reply at 12; Comcast, *Comcast President Brian L. Roberts Testifies about Benefits of Comcast-AT&T Broadband Merger Before U.S. Senate Subcommittee* (press release), Apr. 23, 2002.

<sup>603</sup> Aryeh B. Bourkoff, UBS Warburg, High Yield Cable & Telecommunications (Sept. 20, 2002), at 2.

<sup>604</sup> Application, Pick Decl. ¶ 12.

<sup>605</sup> *Id.* ¶ 17 (estimating annual EBITDA from development of new products of \$100 million to \$200 million within three years); *id.* ¶¶ 19-21 (estimating annual savings from programming cost reductions of \$250 million to \$450 million achieved immediately and as programming contracts are renewed); *id.* ¶ 24 (estimating annual savings from reductions in capital expenditures of \$200 million to \$300 million achieved "over the next four years"); *id.* ¶ 28 (estimating annual EBITDA impact from increased operating efficiencies of \$200 million to \$300 million after one to three years); *id.* ¶ 31 (estimating annual EBITDA increase from sale of national advertising of \$100 million to \$200 million after one to three years). Except potentially for the development of new products, none of these projected savings or new revenue streams requires a significant commitment of new capital expenditures and the consequent risk of loss of sunk investment.

effectively against DRS service.”” These incentives may well exist, but they are neither created nor enhanced by the proposed transaction.”” Even if AT&T Broadband and Comcast were not to merge, each would still have an incentive to grow, to meet investor expectations, and to respond to any competitive threats they perceive. Significantly, only a few cable MSOs have commercially deployed cable telephony despite these incentives.

198. Finally, Applicants’ suggest that the proposed transaction would accelerate deployment of cable telephony in AT&T service areas because the merged entity will have a greater ability to upgrade AT&T’s cable systems, which is a necessary prerequisite to providing cable telephony service.<sup>608</sup> In the previous section, we find that AT&T’s cable systems are likely to be upgraded more quickly as a result of the proposed transaction.<sup>609</sup> Whether that would accelerate the post-upgrade deployment of cable telephony is unclear. The commercial feasibility of cable VoIP when the upgrade is complete, the proximity of a newly upgraded cable system to another cable system that is telephony-ready, and the merged entity’s priorities for deploying new services, among other things, are likely to influence telephony deployment schedules.

199. We conclude that acceleration of cable telephony deployment is a public interest benefit. Although the transaction creates the potential to produce that benefit, we find that this potential is likely to be realized only if cable VoIP technology is proven to be commercially feasible in a timely manner. The technology, however, is too novel for us to make that determination with confidence. Accordingly, we give minimal weight to Applicants’ argument that the proposed transaction will accelerate the deployment of cable telephony.<sup>610</sup>

### C. Increase in Supply of Local and Regional Programming

200. Applicants state that the merger will stimulate the production and delivery of local and regional programming, and extend to customers currently served by AT&T “the kinds of community-oriented coverage that Comcast already provides today to many of its customers.”<sup>611</sup> Applicants cite Comcast’s success in developing and distributing “cn8, The Comcast Network,” which provides locally-focused call-in programs, regional sports coverage, including high school football games, and family entertainment. Applicants state that “cn8 is one of the nation’s largest regional cable networks, serving 3.9 million homes in Pennsylvania, New Jersey, Delaware and Maryland.”<sup>612</sup> cn8 provides 24-hour programming, including “cn8 News,” offering two hours of nightly news and discussions of regional issues.<sup>613</sup>

<sup>606</sup> Applicants’ Reply at 14-15.

<sup>607</sup> Although announcement of the proposed transaction could have affected “investor expectations” regarding the merged entity’s earnings, including earnings from cable telephony, we believe this is unlikely for substantially the same reasons specified in the previous paragraph.

<sup>608</sup> See Application at 38; see also AT&T June 7, 2002. Ex Parte at 2

<sup>609</sup> See Section V.A., *supra*

<sup>610</sup> We reject SBC’s proposal to “encourage” cable telephony deployment by prohibiting the merged entity from obtaining UNE-P in areas where it has cable facilities. See SBC Comments at 42-43; *supra* note 560. As suggested elsewhere in this order, proposals of this sort are more appropriately raised in the context of a rulemaking proceeding.

<sup>611</sup> Application at 42.

<sup>612</sup> *Id.* at 43.

<sup>613</sup> *Id.*

201. Applicants also cite Comcast's production and delivery in the Washington, D.C. area of "Comcast Local Edition," a five-minute program delivered every half hour (at :25 and :55) which "includes interviews with local government officials, discussions of local and regional issues, and promotion of charitable endeavors."<sup>614</sup> These short programs, entitled "Comcast Newsmakers" on Comcast systems in Pennsylvania, New Jersey, Maryland, Delaware, Michigan, and Connecticut, appear on the Comcast channel carrying CNN Headline News. Applicants state that these programs can be "highly localized," showing an interview with a local official in Washington, D.C. to the D.C. audience, while the audience in neighboring Arlington, Virginia will see an interview with one of their local officials.<sup>615</sup>

202. Applicants state that the merger will make it possible to expand the areas in which Comcast's local and regional programming will be made available.<sup>616</sup> Applicants further state that, based on Comcast's experience, advertising revenue will increase to reflect the greater number of viewers, justifying additional investment.<sup>617</sup> Applicants also state that because these successful programs are designed as part of Comcast's "branding strategy," they cannot feasibly be deployed in areas where Comcast does not provide cable service.<sup>618</sup>

203. *Discussion.* The production and delivery of new sources of local and regional programming is a public interest benefit. The record indicates that Comcast has been particularly successful at bringing this programming to its subscribers and that the merged entity will likely extend this practice to AT&T service areas. We cannot find, however, that the proposed transaction is necessary to bring these benefits to subscribers of AT&T's cable systems. Because this programming can be "highly localized,"<sup>619</sup> we are not persuaded that the proposed transaction would generate efficiencies in program production that potentially could spur increased investment in local and regional programming. For example, Applicants have not claimed that any additional clustering created by the merger would facilitate or be a prerequisite to the development of new local or regional programming. Nor have Applicants shown that developing the type of regional and local programming that Comcast has developed requires such specialized expertise that AT&T could not easily duplicate these benefits absent the proposed transaction.<sup>620</sup> Accordingly, we conclude that Applicants have not demonstrated that an increase in the supply of local and regional programming is a benefit that is specific to the proposed transaction.

#### **D. Ability to Compete in the Local, Regional, and National Advertising Market**

204. Applicants state that the merger would create the first cable company with the geographic reach to sell advertising on a national scale. The merged firm would have a presence in 8 of the 10 largest Designated Market Areas ("DMAs") and would pass 38 million homes nationwide.<sup>621</sup> Applicants project that this would allow the merged entity to compete more effectively against broadcast television, DBS,

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<sup>614</sup> *Id.* at 43-44.

<sup>615</sup> *Id.* at 44.

<sup>616</sup> *Id.*

<sup>617</sup> *Id.* at 44-45.

<sup>618</sup> *Id.* at 45.

<sup>619</sup> *Id.* at 44.

<sup>620</sup> At most, the record indicates that Comcast merely has made a different business judgment than AT&T about the value of developing local and regional programming.

<sup>621</sup> Application at 45, Pick Decl. at ¶ 29.

and cable networks in the national advertising market.”? Applicants state that Comcast’s excess capacity to sell advertising time will facilitate this new business opportunity.<sup>623</sup> Advertisers paid the broadcasting industry \$15 billion for national advertising in 2001,<sup>624</sup> and Applicants calculate that capturing 1% to 2% of this market would generate \$100 to \$200 million per year in EBITDA within one to three years.<sup>625</sup> Applicants also state that through their national footprint, advertisers’ could reduce the transaction costs of negotiating with many cable systems, and thereby have a more efficient advertising outlet. Applicants contend that by providing a new, more efficient national advertising outlet, their merger will enhance competition in this market and provide a public interest benefit.

205. Some commenters, however, suggest that Applicants’ entry into the national advertising market would harm programming networks and advertising agencies, particularly since the merged firm will have a significant market presence in 8 of the top 10 DMAs.<sup>626</sup> Qwest argues that the location and concentration of the merged firm’s cable customers, with 70% of its subscribers in the top 20 DMAs, will allow it to significantly impair a programming network’s ability to advertise nationally. Because a significant portion of each network’s revenues comes from advertising sales, Qwest argues that the quantity and quality of network programming will be reduced.”

206. *Discussion.* Typically, advertising revenue for cable systems is a function of carriage contracts with programming networks. Cable systems negotiate with cable networks for time slots to sell local advertising, and they typically receive a share of national advertising revenue from programming networks. By greater scale of operation, Applicants could conceivably negotiate more favorable contracts with programming networks, permitting them to sell national advertising directly and potentially increasing advertising revenue per subscriber that the merged entity would receive. Nevertheless, we find no evidence beyond bare assertions that the relevant product market is television advertising, the market that Applicants seem to use. Nor do Applicants show how the merged entity’s market presence will improve its share of any relevant advertising market. Applicants also make no attempt to calculate the extent of the claimed benefit in those markets, and they do not explain how the merged entity’s alleged improved position in national, regional, or local advertising markets would benefit the public. Based on the thinness of this record, we decline to give this claimed benefit significant weight.

## VI. QUALIFICATIONS AND CHARACTER ISSUES

207. Section 310(d) of the Communications Act provides that no station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the “public interest, convenience and necessity will be served thereby.”<sup>628</sup> Among the factors that the Commission considers as part of its public interest inquiry is whether the applicant for a license has the requisite “citizenship, character, financial, technical, and other qualifications.”<sup>629</sup> The Commission has previously determined that, in deciding character issues, it will consider certain forms of adjudicated,

<sup>622</sup> Application. Pick Decl. at ¶ 30.

<sup>623</sup> *Id.* at ¶ 31

<sup>624</sup> *Id.* at ¶ 31

<sup>625</sup> Application at 46-47, Pick Decl. at ¶ 31.

<sup>626</sup> Qwest at 11; Prime Communications Presentation.

<sup>627</sup> Qwest at 11

<sup>628</sup> 47 U.S.C. § 310(d).

<sup>629</sup> See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc.; Transferee*, 13 FCC Rcd 21292, 21305 ¶ 26 (1998) (“SBC-SNET Order”).

non-FCC-related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition.<sup>630</sup> With respect to FCC related conduct, the Commission has stated that it would treat any violation of any provision of the Act, or of the Commission's rules or policies, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications.<sup>631</sup> The Commission has used its character policy in the broadcast area as guidance in resolving similar questions in transfer of common carrier authorizations and other license transfer proceedings.<sup>632</sup>

208. CWA comments that AT&T has a record of non-compliance regarding its local franchise obligations, in particular, its adherence to locally-imposed customer service standards.<sup>633</sup> The Sacramento Metropolitan Cable TV Commission ("SMCTC") has also expressed concern about AT&T's failure to honor its local customer service commitments.<sup>634</sup> SMCTC has cited several consumer complaints documenting, among other things, poor telephone response time at AT&T's customer service center and incorrect billing on customer statements.<sup>635</sup>

209. Aside from customer service issues, other parties question whether Applicants are fit to hold a government license. For example, the Borough of Blawnox, Pennsylvania ("Blawnox"), alleges that AT&T, with the complicity of Comcast, filed an intentionally false ownership document with the Commission regarding the identity of the cable operator. Blawnox states that AT&T filed such document in order to conceal Comcast's ownership of the cable system in Blawnox Borough and argues that filing a false document with the government is evidence that AT&T and Comcast are not qualified to hold licenses issued by the Commission.<sup>636</sup> In addition, a citizen's coalition from Marietta, Georgia ("Marietta Coalition"), asserts that AT&T filed unsubstantiated criminal reports resulting in the arrest of several low-income minority citizens of Marietta, Georgia for cable theft.<sup>637</sup> Because AT&T failed to investigate whether the affected parties were lawfully receiving cable before filing such reports, and because AT&T

<sup>630</sup> See *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20092-93 (1998).

<sup>631</sup> *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209-10 (1986), modified, 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991), modified in part, 7 FCC Rcd 6564 (1992) (hereinafter, "*Character Policy Statement*"). Allegations that an applicant has engaged in unreasonable or anticompetitive conduct are relevant to the public interest analysis. *SBC-SNET Order*, 13 FCC Rcd at 21306-07 ¶¶ 29-30.

<sup>632</sup> See, e.g., *EchoStar-DirecTV Order*, FCC 02-284 at ¶ 28; *SBC-SNET Order*, 13 FCC Rcd at 21305 ¶ 26.

<sup>633</sup> CWA comments at 3, 21-22. The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") believes that Applicants will consolidate customer care and provisioning, maintenance, and repair centers once the merger is complete. It argues that this development will result in a "serious decline in service quality." Ratepayer Advocate states that decreased efficiency at the call centers due to employee unfamiliarity with the local cable territory, as well as increased difficulty of the local franchising authorities to monitor and enforce cable companies' compliance with customer service performance standards, can reasonably be foreseen. Ratepayer Advocate Reply Comments at 4 (citing CWA comments at 21-22).

<sup>634</sup> See Letter from Rich Esposto, Executive Director, Sacramento Metropolitan Cable Television Commission (filed Apr. 29, 2002).

<sup>635</sup> Sacramento Community Cable Program Providers ("SCCPP") has urged the SMCTC to condition its approval of the AT&T-Comcast merger on compliance with certain terms agreed to by AT&T when it acquired local systems. SCCPP is concerned that the merged entity does not intend to satisfy the public, educational and governmental ("PEG") access terms or other conditions agreed to by AT&T when it acquired the systems two years earlier. See Letter from Ron Cooper, Executive Director, Access Sacramento, to Robbie Waters, Chair, Sacramento Metropolitan Cable Television Commission (filed Apr. 29, 2002).

<sup>636</sup> Blawnox Comments at 5.

<sup>637</sup> Marietta Coalition Comments, *passim*.

allegedly targeted these consumers based on their race and income, Marietta Coalition argues that AT&T does not meet the Commission's character qualifications. **Also**, James J. Clancy ("Clancy") urges us to deny the Application on grounds that AT&T has, over a 23-month period from October 20, 2000, through October 2, 2002, repeatedly distributed obscene material and subliminal messages over its cable system serving La Tuna Canyon, California.<sup>638</sup>

210. Additionally, Minority TV, licensee of KMPT(TV), Channel 32, San Francisco, California, a noncommercial public television station, urges us to deny the Application on grounds that AT&T has improperly refused to carry its broadcast signal on certain cable systems. Minority TV claims that AT&T is acting in a discriminatory manner, and in violation of the Commission's must carry rules, for refusing to carry the station's foreign language programming.<sup>639</sup>

211. Applicants assert that many of the commenters' criticisms are groundless and beyond the scope of the Commission's merger analysis. With regard to the issue of customer service and compliance with franchising requirements, Applicants assert that local disputes are not generated or affected by a merger at the national level.<sup>640</sup> Moreover, Applicants assert that AT&T is committed to providing customers with quality customer care and has committed resources to better address customer complaints.<sup>641</sup> Applicants argue that allegations of malicious prosecution should have no bearing upon the merger proceeding.<sup>642</sup> Since Marietta Coalition cannot substantiate the claim, Applicants argue that it cannot form any legitimate basis for the Commission to deny the merger based on character qualification.<sup>643</sup> Applicants also assert that Blawnox's filing is baseless and is simply an effort to gain leverage in a litigation matter pending in a federal district court.<sup>644</sup> With respect to the Minority TV complaint, Applicants argue that the station is attempting to re-litigate a broadcast signal carriage dispute in this merger proceeding, this time under the "guise of a lack of commitment to program diversity."<sup>645</sup> Applicants state that AT&T carries KMPT on every cable system where KMPT meets its statutory obligation to deliver a good quality signal. In cases where the station does not provide a good quality signal, AT&T asserts that it has acted fully within its rights to decline carriage.

212. **Discussion.** The panics raising issues of character and legal non-compliance have failed to convince us that we should deny the merger based on the allegations. **As** for Marietta Coalition and Blawnox's claims, the record evidence does not persuade us that Applicants have actually violated any Federal, state, or local law. Specifically, the parties do not raise material questions of fact regarding whether AT&T, or Comcast for that matter, has engaged in any conduct unbecoming a Commission licensee. Further, it appears that the complaining parties appropriately have resorted to other fora to resolve their disputes with Applicants. The arguments presented, therefore, do not form any legitimate basis for the Commission to deny the merger based on character qualification.<sup>646</sup> With respect to the

<sup>638</sup> *Ser Ex* Pane Petition of James J. Clancy to Deny Applications and Revoke Licenses (filed Nov. 3, 2002).

<sup>639</sup> *See* Minority TV Comments. *passim*.

<sup>640</sup> *See* Applicants' Reply at 120.

<sup>641</sup> *Id.* at 124.

<sup>642</sup> *Id.* at 130. Applicants note that there are ongoing legal proceedings in the state of Georgia regarding the claims raised by Marietta Coalition.

<sup>643</sup> *Id.* at 131.

<sup>644</sup> *Id.* at 131, n.409.

<sup>645</sup> Applicants' Reply at 122.

<sup>646</sup> The Commission's Character Qualification Policy Statement prohibits licensing decisions "based on mere allegations of . . . non-FCC misconduct." *See Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252, 3252 ¶ 7 (1990) (citing *Character Policy Statement*, 102 FCC 2d at 1204-05 (1986)).

charges of CWA and SMCTC, there is no precedent to support the claim that customer service violations are to be considered in the character qualification analysis.<sup>647</sup>

213. We deny Clancy's late-filed<sup>648</sup> petition to deny the Application. Clancy does not offer any evidence that a court has adjudged that any programming distributed by AT&T is or was obscene, nor any other evidence to suppon his allegations.<sup>649</sup> To the extent that the petition describes programming that might be considered indecent, we note that the services provided by AT&T are not broadcast services, but subscription-based services, which do not call into play the issue of indecency.<sup>650</sup> Clancy's allegations do not justify action on the petition in the context of this proceeding.<sup>651</sup> We will, however, refer Clancy's petition to the Commission's Enforcement Bureau for any further action it deems appropriate. In addition, we note that the petition was extremely untimely, having been filed 189 days after the date for the filing of such petitions and only nine days before the Commission's adoption of its **Order** in this proceeding.

214. Finally, we note that Minority TV has initiated two proceedings at the Commission, a must carry complaint and a petition for forfeiture, precisely on the same facts the station now raises in this proceeding.<sup>652</sup> Its carriage complaint and petition for forfeiture have been resolved.<sup>653</sup> The Media Bureau found that Minority TV's station is entitled to carriage on certain of AT&T's cable systems but that it was not entitled to have AT&T's Mt. Sutro facility designated as AT&T's principal headend for the San Francisco television market. Additionally, the Bureau denied Minority TV's Petition to Initiate a Forfeiture Proceeding. Given that the issues stemming from Minority TV's complaints have been fully considered and that the record does not suppon the allegation of a character defect warranting denial of the application before us, we reject Minority TV's petition to deny.

<sup>647</sup> Recent reports suggest that local franchising authorities are capable of addressing customer service issues involving AT&T. See Linda Haugsted, *Miami Approves AT&T-Comcast Transfer*, MULTICHANNEL NEWS, (Aug. 26, 2002) (in approving the franchise transfer, AT&T, Comcast, and the City of Miami agreed "to work together" to halt customer complaints. The company will pay a \$72,000 penalty to resolve existing customer care lapses, will designate one technical liaison and one management liaison to the city to handle the most difficult complaints, and will meet quarterly with the city to report on service issues.).

<sup>648</sup> The petition was filed on November 3, 2002, more than six months after the April 29, 2002 deadline for filing or petitions to deny the Application. *AT&T Corp. and Comcast Corp. Seek FCC Consent for a Proposed Transfer of Control*, MB Docket No. 02-70. Public Notice, 17 FCC Rcd 5907 (2002) (establishing a deadline of April 29, 2002 for filing of comments or petitions to deny the Application); see also 1.939(a)(2) (providing that petitions to deny may be filed no later than 30 days from the date of public notice listing an application as accepted for filing).

<sup>649</sup> Clancy's petition references several exhibits and attachments that, at the time of adoption, still had not been received by staff reviewing the transaction.

<sup>650</sup> See *Harriscopel of Chicago, Inc., et al.*, 3 FCC Rcd 757, 760 n.2 (1988). Cf. *Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8000 and n.9 (2001) (noting that courts have recognized that the "special justifications" for regulating the broadcast of indecent material—its history of pervasive regulation, the scarcity of broadcast frequencies and broadcast's "invasive" nature—do not apply to other speakers).

<sup>651</sup> See *Litigation Recovery Trust Petition for a Determination Whether Comsat Corp. Has Violated the Public Interest Standard of the Communications Satellite Act*, FCC 02-279 (rel. Oct. 28, 2002) (holding that an allegation of obscenity unsupported by a court finding did not warrant requested relief).

<sup>652</sup> See KMPT Complaint for Carriage, CSR-5513-M (filed Jun. 14, 2000) and KMPT Petition to Initiate a Forfeiture Proceeding, CSC-391 (filed Mar. 28, 2002).

<sup>653</sup> See *Minority Television Project Inc., KMTP(TV), Channel 32 v. AT&T Broadband, LLC*, DA-02-3130 (MB rel. Nov. 12, 2002).

## VII. BALANCING PUBLIC INTEREST HARMS AND BENEFITS

215. Having evaluated the potential public interest harms and benefits of the proposed transaction, we weigh the potential harms against the potential benefits to determine if, on balance, the transfers of control at issue serve the public interest, convenience, and necessity.<sup>654</sup> As explained above, the first step in undertaking this balancing is to consider the public interest harms that may result from the proposed transaction. Several parties also have alleged that the proposed transaction would harm competition in various markets because of the size or market power of the merged entity. These allegations involve competition in the packaging and sale of video programming, MVPD competition, broadband Internet access, broadband content production, Internet video distribution, set-top boxes, ITV, and Internet automobile advertising. After examining the record, we cannot conclude that the merged entity's size or market presence would harm competition in these areas.

216. In the programming market in particular, the combination of AT&T and Comcast, together with AT&T's interest in TWE, could create a potential public interest harm by giving the merged entity monopsony power. However, the Applicants have proposed to insulate and divest the merged entity's interest in TWE. We find that the insulation and divestiture will adequately address any potential harm that the proposed transaction would create in the programming market, and we need not examine this issue in any greater detail. Accordingly, we condition our approval of the proposed transfer to require AT&T Comcast to insulate and divest its interest in TWE.

217. Having examined and addressed the potential harms of the proposed transaction, we consider its benefits. We give little weight to Applicants' argument that the proposed transaction will accelerate the deployment of cable telephony. Although we find cable telephony deployment to be a public interest benefit, we cannot conclude with sufficient confidence that cable VoIP technology will be commercially feasible in a time frame that permits us to give weight to the Applicants' claims. We also conclude that the record is inadequate to support a finding that the proposed transaction will promote competition in the national, regional, or local advertising markets, and we have no evidence showing how the merged entity's position in the advertising market will benefit the public. We conclude, however, that the proposed transaction is likely to accelerate the deployment of broadband services in AT&T service areas. The evidence indicates that the merger is not necessary to enable AT&T to generate more local and regional programming in its service areas.

218. As noted above, in balancing the public interest harms and benefits, we employ a sliding scale approach. Under that approach, we examine the likelihood and the magnitude of the potential public interest harms. Here, we find that any potential public interest harms that might result from the proposed transaction are mitigated by the conditions we adopt in this Order, and that no unmitigated public interest harms remain. We also find that the proposed transaction is likely to result in modest public interest benefits by accelerating deployment of broadband services. Accordingly, after reviewing the record and weighing the potential harms against the potential benefits, we conclude that, on balance, the transfers of control at issue would serve the public interest, convenience, and necessity.

## VIII. PROCEDURAL MATTERS

219. On November 7, 2002, CFA filed an *Emergency Motion for Suspension of Proceeding* (the "CFA Emergency Motion")<sup>655</sup> in which it asks the Commission to suspend action on the Application until the completion of judicial review of the Commission's order (the "ISP Order") denying CFA's

<sup>654</sup> See, e.g., *DT- VoiceStream*, 16 FCC Rcd at 9789 ¶ 17 (2001).

<sup>655</sup> See *Emergency Motion for Suspension of Proceeding of Consumer Federation of America, Consumers Union and the Center for Digital Democracy* (filed Nov. 7, 2002).



motion to compel production of the AOL ISP Agreement (the “ISP Motion”).<sup>656</sup> CFA also filed a Petition for Review of the ISP Order with the United States Court of Appeals for the District of Columbia Circuit.<sup>657</sup> CFA asserts that although it does not seek a stay of a Commission order or rule, it meets the legal standard for such a stay, because it is likely to prevail on the merits, and because suspending the instant proceeding will not substantially harm parties to the proceeding.<sup>658</sup>

220. CFA states that the Commission failed to discuss “even one of the cases” CFA cited in support of its ISP Motion. To the contrary, the ISP Order cites several of the cases relied upon by CFA in support of its ISP Motion; we do not, however, interpret these cases as CFA does.<sup>659</sup> In any event, the Commission has concluded that it can make its public interest determination without reference to the AOL ISP Agreement and that, indeed, the AOL ISP Agreement is not of decisional significance. Accordingly, CFA’s Emergency Motion is denied.

## IX. ADMINISTRATIVE MATTER

221. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418-7365, or at [bmillin@fcc.gov](mailto:bmillin@fcc.gov).

## X. CONCLUSION

222. We conclude that the positive public interest benefits promised by this merger are sufficient to support the Commission’s approval of AT&T’s and Comcast’s Application, under the public interest balancing test of sections 214(a) and 310(d) of the Communications Act, subject to the conditions specified in this Order. To avoid potential harm to competition and diversity in video programming in particular, and as a non-severable condition of our approval of the Application, the Applicants must insulate and divest AT&T’s interest in TWE, and any interests in successor firms, in accordance with the conditions set forth in Section IV.A.2. and Appendix B. The specific license and authorization transfers granted by this Order are set forth in Appendix D.

## XI. ORDERING CLAUSES

223. Accordingly, having reviewed the Application and the record in this matter, **IT IS ORDERED**, pursuant to sections 4(i), 4(j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Application filed by AT&T Corp. and Comcast Corporation IS GRANTED subject to the conditions stated below.

224. **IT IS FURTHER ORDERED**, pursuant to sections 4(i), 4(j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the above grant shall include authority for AT&T Comcast to acquire control of

<sup>656</sup> See *ISP Order*, FCC 02-301

<sup>657</sup> CFA Emergency Motion at 2

<sup>658</sup> *Id.* at 2-3

<sup>659</sup> See *ISP Order*, FCC 02-301 (citing *AT&T-TCI Order*, *AT&T-MediaOne Order*, *AOL-Time Warner Order*, *SBC Communications Inc. v. FCC*, 56 F.3d 1483 (D.C. Cir. 1995); *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980)). Each of these cases was relied upon by CFA in support of its Motion. The CFA Emergency Motion particularly complains that we did “reconcile” the ISP Order with our decision in *Application of LUF, Inc. (Assignee), and Long Nine, Inc. (Assignor) For Assignment of License of Station WYVR(FM)*, FCC 02-235 (rel. Aug. 22, 2002) (“*LUF*”). CFA Emergency Motion at 2. In *LUF*, we concluded that contract submission requirements should be relaxed to exclude non-material contract attachments. Thus, if anything, *LUF* supports, rather than undermines, the ISP Order.

- a) any authorization issued to AT&T Corp. or Comcast Corporation, their subsidiaries, or their affiliates during the Commission's consideration of the Application and the period required for consummation of the merger transaction following approval;
- b) construction permits held by licensees involved in this transfer that matured into licenses during the Commission's consideration of the Application or that mature into licenses after closing of the merger transaction and that may have been omitted from the transfer of control Application; and
- c) applications filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.<sup>660</sup>

225. **IT IS FURTHER ORDERED** that this grant **IS CONDITIONED** on our requirement (the "TWE Condition") that the Applicants, (a) prior to merger closing, place in trust AT&T's interest in TWE, (b) upon consummation of any restructuring of TWE, place resulting non-cash assets in trust, (c) divest their interests in TWE, and (d) abide by restrictions set forth in Appendix B regarding their involvement in the day-to-day management or operations of TWE or successor firms, their exercise of any governance rights in TWE or any successor firms, and their communications with TWE or any successor firms.

226. **IT IS FURTHER ORDERED** that this grant **IS CONDITIONED** on our requirement that AT&T Comcast shall file with the Media Bureau, within 60 days of the eventual sale of the TWE attributable interest, a written document evidencing the sale.

227. **IT IS FURTHER ORDERED** that this grant **IS CONDITIONED** on our requirement that, as of closing, AT&T Comcast shall comply with our cable/SMATV cross-ownership rule, 47 C.F.R. § 76.501 (d).

228. **IT IS FURTHER ORDERED** that this grant **IS CONDITIONED** on our requirement pursuant to section 25.119(f) of our rules, 47 C.F.R. § 119(f), that AT&T Comcast shall complete this transaction within 60 days from the date of this authorization. and file with the Commission, within 30 days of consummation, notification by letter of the date of consummation and amend all pending earth station applications to reflect the new ownership structure approved in this Order.

229. **IT IS FURTHER ORDERED** that compliance with all conditions imposed herein is a non-severable condition of the grant of the Application.

230. **IT IS FURTHER ORDERED** that all references to AT&T Corp. and Comcast Corporation in this Order shall also refer to their respective officers, directors, and employees, as well as to any affiliated companies, and their officers, directors, and employees.


231. **IT IS FURTHER ORDERED**, pursuant to sections 4(i), 4(j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petition to Deny of the Borough of Blawnox, Pennsylvania; the Petition to Deny of Lisa Burton, et al.; the Petition to Deny of Consumer Federation of America, et al.; the Petition to Deny of Minority Television Project, Inc.; the Petition to Deny Applications or Condition Consent of RCN Telecom Services, Inc.; the Petition to Deny of Venzon Telephone Companies and Venzon Internet Solutions; the Ex Parte Petition of James J. Clancy to Deny Applications and Revoke Licenses; and the

<sup>660</sup> See *WorldCom-MCI Order*, 13 FCC Rcd at 18153 ¶ 226(c).

requests of any party seeking similar relief, are DENIED.

232. **IT IS FURTHER ORDERED**, that the Emergency Motion for Suspension of Proceeding of Consumer Federation of America, Consumers Union, and the Center for Digital Democracy is DENTED.

233. **IT IS FURTHER ORDERED** that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release, in accordance with section 1.103 of the Commission's rules, 47 C.F.R. § 1.103

FEDERAL COMMUNICATIONS COMMISSION  
  
Marlene H. Dortch  
Secretary

## APPENDICES

### APPENDIX A - LIST OF COMMENTERS

### APPENDIX B - MERGER CONDITIONS

### APPENDIX C - CONFIDENTIAL APPENDIX

### APPENDIX D - LIST OF LICENSES AND AUTHORIZATIONS

